Oklahoma Installation Company *and* Carpenters Local Union No. 223, affiliated with United Brotherhood of Carpenters and Joiners of America, AFL–CIO *and* Rick Beattie. Cases 26–CA–14107 and 26–CA–14249

December 11, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT AND RAUDABAUGH

On April 16, 1992, Administrative Law Judge Nancy M. Sherman issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

1. The judge found that the Respondent violated Section 8(a)(1) through statements by Supervisor Darwin McBrayer on two occasions in October 1990, during the representation election campaign. On October 10, McBrayer told employee James Burgess, a union activist, that Burgess had ''hurt [his] feelings'' by starting ''all this Union bull'' and by bringing union T-shirts and union ''work rule'' booklets onto the job and handing them out to employees. On October 12, McBrayer angrily told employee James Stewart, another union activist who openly distributed union materials to employees, that he was ''disappointed'' with Stewart and Burgess because of their union activities and that he had thought that they would ''shoot straight'' with him.

In finding these statements unlawful, the judge (at slip op. 21) relied on cases in which the Board found that supervisors' statements violated Section 8(a)(1) by equating protected activity with disloyalty to the employer. We do not find those cases apposite. Absent some direct reference by McBrayer to disloyalty, we do not find that his expression of purely personal opinions about Burgess' and Stewart's protected activities in the circumstances here constitutes interference, coercion, or restraint with respect to the employees' Section 7 rights. Accordingly, we shall dismiss the complaint allegations regarding McBrayer's comments to employees in October 1990. *Seaward International*, 270 NLRB 1034, 1042 (1984).

2. The judge also found that the Respondent violated Section 8(a)(1) when, about 1 week before the November 15, 1990 election, McBrayer distributed T-shirts and caps bearing the Respondent's logo, along with a letter urging a ''no'' vote, to employees who had not requested such garments.

We disagree with the judge's acceptance of the General Counsel's theory of the 8(a)(1) violation—that the distribution of shirts and caps at the same time as the ''vote no'' letter constituted unlawful interrogation of employee sentiment concerning the pending election. We find the cases relied on by the judge to be distinguishable. In *Lott's Electric Co*., 293 NLRB 297, 303–304 (1989), enfd. mem. 891 F.2d 601 (3d Cir. 1989); *Houston Coca-Cola Bottling Co*., 256 NLRB 520 (1981); and *Maremont Corp*., 294 NLRB 11, 40 (1989), the unlawful interrogations consisted of distributing ''vote no'' buttons or caps which, when worn or rejected by the employees, would signal their voting predispositions to management.

In this case, although the items of clothing distributed by the Respondent did display the company logo, the record does not reveal that they included any additional writing or insignia indicating an explicit proemployer or antiunion preference in the upcoming election. Nor does the record show that any employee was required or even asked to wear the clothing proffered by the Respondent, to display or show to others the ''vote no'' letter,[2] or refrain from wearing or displaying union insignia.

Thus, in the circumstances of this case, we do not find that the Respondent attempted to pressure employees to make an observable choice or open acknowledgement concerning their campaign position. We shall therefore dismiss the 8(a)(1) allegation that the Respondent unlawfully interrogated employees by distributing company shirts and caps even though accompanied by antiunion literature.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's finding of antiunion animus underlying the 8(a)(3) violations, Members Oviatt and Raudabaugh find it unnecessary to rely on Administrative Law Judge Joan Wieder's decision in *Oklahoma Installation, Inc*., Cases 16–CA–14647–1 and 16–RC–9320 (Apr. 18, 1991).

We correct three inadvertent errors of the judge. First, the judge incorrectly refers at several points to the allegedly discriminatory joint layoff of Burgess and employee Ralph Smith as having occurred on October 10, 1990, rather than on October 9. Second, in sec. II,G,1 of her decision, the judge stated that an 8(a)(1) violation occurred when employee Roger Davis told Burgess that the Respondent was discriminating against union members in hiring. As the judge correctly found in sec. II,A, of her decision, that information was given *to* Davis by Supervisor Taylor. These inadvertent errors do not affect the results in this case.

[2] See *Jefferson Stores*, 201 NLRB 672 (1973) (unlawful interrogation allegation dismissed where, inter alia, ''vote no'' cards distributed at plant doors did not have pins by which they could be affixed to clothing).

ORDER

The National Labor Relations Board orders that the Respondent, Oklahoma Installation Company, Owasso, Oklahoma, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling employees that their union activity will hurt the employment of union sympathizers and that the Respondent is discriminating against union members in hiring.

(b) Forbidding employees, without expressing any limitations on location, from distributing clothing which shows support of unionization, at times when neither the distributor not the recipient of such clothing is supposed to be actively working.

(c) Discouraging membership in Carpenters Local Union No. 223, affiliated with United Brotherhood of Carpenters and Joiners of America, AFL–CIO, or any other labor organization by laying off employees, by failing or refusing to hire employees, or by otherwise discriminating in regard to hire or tenure of employment or any term or condition of employment.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) If the Respondent's job at the Hickory Hollow Mall in Davidson County, Tennessee, has not yet been completed, offer employment on that job to Rick Beattie, James Burgess, Danny Cason, Flem Roger Davis, Michael McCutcheon, Ronald Skipper, James Michael Stewart, and Philip Wood.

(b) Make these employees, the estate of William Wooten, and any other employees whole for any loss of pay they may have suffered by reasons of the discrimination against them, in the manner set forth in the remedy section of the judge's decision.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at all of its jobs in Davidson County, Tennessee, copies of the attached notice marked ''Appendix.''[3] Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Mail a signed copy of the notice to the following employees:

(1) Every employee who worked for the Respondent on the Green Hills Mall job on or after July 9, 1990.

(2) Unless the Respondent's Hickory Hollow Mall job is still in progress, to every employee who worked for the Respondent on that job.

(3) As to other jobs in Davidson County completed by the Respondent after July 9, 1990, to every carpenter, apprentice carpenter, and carpenter's helper who worked for the respondent on that job on or after that date.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that those allegations of the complaint for which no violations have been found are dismissed.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT tell you that your union activity will hurt the employment of union sympathizers or that we are discriminating against union members in hiring.

WE WILL NOT forbid you, without expressing any limitation on location, from distributing clothing which shows support of unionization, at times when neither the distributor nor the recipient of such clothing is supposed to be actively working.

WE WILL NOT discourage membership in Carpenters Local Union No. 223, affiliated with United Brotherhood of Carpenters and Joiners of America, AFL–CIO, or any other union, by laying you off, by failing or refusing to hire you, or by otherwise discriminating in regard to hire or tenure of employment or any term or condition of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights under Section 7 of the Act.

WE WILL, if our job at the Hickory Hollow Mall in Davidson County, Tennessee, has not yet been completed, offer employment on that job to Rick Beattie, James Burgess, Danny Cason, Flem Roger Davis, Michael McCutcheon, Ronald Skipper, James Michael Stewart, and Philip Wood.

WE WILL make these employees, the estate of William Wooten, and any other employees whole, with interest, for any loss of pay they may have suffered by reason of the discrimination against them.

OKLAHOMA INSTALLATION COMPANY

Jane Vandeventer, Esq., for the General Counsel.
Stephen L. Andrew, Esq., of Tulsa, Oklahoma, for the Respondent.
W. J. Stricklin, Esq. and *Othal Smith, Esq.*, of Nashville, Tennessee, for the Charging Party.

DECISION

STATEMENT OF THE CASE

NANCY M. SHERMAN, Administrative Law Judge. These consolidated cases were heard before me in Nashville, Tennessee, on March 5 and 6, 1991. The charge in Case 26–CA–14107 was filed against Respondent Oklahoma Installation Company (the Company) by Carpenters Local Union No. 223, affiliated with United Brotherhood of Carpenters and Joiners of America, AFL–CIO (the Union) on October 15 and amended on November 14, 1990; a complaint in that case was issued on November 16, 1990. The charge in Case 26–CA–14249 was filed by Rick Beattie, an individual, on January 10 and amended on February 13, 1991. A consolidated complaint in both cases was issued on February 13 and amended on March 6, 1991. In its final form, the consolidated complaint alleges that Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) by various statements to employees between about August and November 1990; and violated Section 8(a)(1) and (3) by laying two employees off for 1 day on October 9, 1990; by permanently laying off four employees on October 12, 1990; and by failing and refusing to hire eight employees since about November 29, 1990; all to discourage union activity.

On the basis of the entire record, including the demeanor of the witnesses, and after due consideration of the briefs filed by counsel for the General Counsel (the General Counsel) and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a corporation with an office and place of business in Owasso, Oklahoma, and various jobsites in Davidson County, Tennessee. Respondent is engaged in the installation of fixtures and interior millwork. During the 12-month period preceding October 31, 1990, Respondent provided services valued in excess of $50,000 directly to customers located outside Oklahoma; and purchased and received at its Tennessee jobsites products, goods, and services valued in excess of $50,000 directly from points outside Tennessee. I find that, as Respondent admits, Respondent is engaged in commerce within the meaning of the Act, and that assertion of jurisdiction over its operations will effectuate the policies of the Act. The Union is a labor organization within the meaning of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Alleged Prepetition Interference, Restraint, and Coercion*

The main business of Respondent, an Oklahoma-based construction company, is the installation of fixtures—for example, counters, showcases, cashier stands, risers, wall attachments, and display racks—in retail store buildings which are being constructed or remodeled. In March 1990, Respondent began a job in Green Hills Mall (located in Davidson County, Tennessee) which consisted of installing fixtures in connection with the remodelling of an existing Dillard's department store and in a new addition to that store.

On June 19, 1990, Flem Roger Davis (Roger Davis), a journeyman carpenter, filed a job application with Darwin McBrayer, an admitted supervisor who was Respondent's superintendent on the Green Hills job. Also, Davis expressed interest in that job to Leonard Taylor, a foreman for Respondent on the Green Hills job and admittedly a supervisor after June 27, 1990, who lived in the same apartment complex as Davis. Davis had served his apprenticeship under union auspices, but at an undisclosed time had withdrawn from the Union after getting far behind in his dues. When hiring for the Green Hills job, McBrayer had asked carpenters already working for Respondent to recommend new carpenters. Moreover, Davis' job application disclosed that although he had never previously worked for Respondent, his most recent employment had been at a construction project, a union job referred to in the record as the Saturn job, where Foreman Taylor had also worked. Taylor, who has been a member of the Union since October 1987, testimonially admitted to ''vaguely'' knowing, from hearing at union meetings lists of who was in arrears, that Davis was in arrears with his dues. Further, Taylor testimonially admitted to telling McBrayer that Taylor would like Davis to work on the Green Hills project.[1]

No earlier than July 5, and probably about July 9, Taylor sent Davis a message that if he wanted to come to work, to come talk to Taylor at the apartment swimming pool. When Davis arrived at the swimming pool, Taylor asked him if he wanted to go to work at the Green Hills job. Davis said yes. Taylor said that he would pick Davis up the following morning and he could come to work. Davis said that he was not a union member and was in arrears with his dues. Taylor said that he had known this; that he and McBrayer had talked about Davis' not being in a union and having dropped out; and that McBrayer had said that was good and he would go ahead and hire Davis and Ralph Smith since they had dropped out, because McBrayer did not want to have trouble later on down the road if he got too many more union people on the job. Davis began to work for Respondent at the Green Hills job on the following day.

My finding as to the date of this Taylor-Davis conversation is based on Davis' testimony that it occurred the day before he started to work on the Green Hills job, and on Respondent's records, which show that Davis and Ralph Smith were hired for that job during the payroll week ending

[1] According to Taylor's testimony, he told both Davis and McBrayer that Taylor wanted Davis to work on the Green Hills project at least partly because Davis owed Taylor money, which Davis eventually repaid.

Wednesday, July 11, and worked 20 hours that week.[2] My findings as to what was said are based on Davis' testimony, indirectly corroborated by Taylor's testimony that he ''vaguely'' knew about Davis' status with the Union. Because Taylor did not deny making this statement to Davis, its truth or falsity has no bearing on whether it violated Section 8(a)(1). *Woody's Truck Stops*, 258 NLRB 705 (1981). Taylor did deny, in effect, that he had the conversation with McBrayer which Taylor described to Davis. However, McBrayer was not asked about this matter. Because admitted Supervisor Taylor admittedly played a part in McBrayer's decision to hire Davis, Davis' testimony as to what Taylor told him about McBrayer's remarks on this subject is receivable to prove the truth of what Taylor said. *United Beef Co.*, 277 NLRB 1014, 1024–1025 (1985); *Security Search & Abstract Co*., 290 NLRB 908, 913 fn. 17 (1988), enfd. 882 F.2d 512 (3d Cir. 1989); *Bohemia, Inc*., 266 NLRB 761, 763–764 (1983). Moreover, for demeanor reasons, I discredit Taylor's uncorroborated denial that McBrayer made the remarks Taylor undeniedly attributed to him during the Taylor-Davis conversation. See *NLRB v. Walton Mfg. Co*., 369 U.S. 404, 408 (1962). Although Taylor was not working for Respondent at the time he testified on its behalf, he left work at Respondent's Hickory Hollow job because of problems in getting along with the superintendent, Klint Traylor, who was also the superintendent at Respondent's only other current job (Cool Springs Mall) in the Nashville area. At the time of the hearing, McBrayer was still working for Respondent.

B. *The August–September 1990 Picketing; the Alleged Discriminatory Layoff of James Burgess and Ralph Smith on October 10, 1990*

Between August 20 and September 9, 1990, the Union picketed the Green Hills jobsite with signs which claimed that Respondent did not pay wages and benefits equivalent to those paid by employers with whom the Union had agreements. The record contains some suggestion that this picketing may have had a recognitional object. A majority of Respondent's employees honored this picket line on the first day it was set up. Among those who initially honored the picket line were admitted Supervisors Taylor and Johnny Morgan. Taylor returned to work on the following day. Morgan eventually crossed the picket line, but the record fails to show when.

While this picketing was in progress, employee James Michael (Mike) Stewart, a Green Hills carpenter who was the Union's recording secretary and was honoring the picket line, attempted to induce other carpenters in Respondent's employ to sign union authorization cards. During this period, on an occasion when Stewart was sitting in his car in Dillard's parking lot waiting for Green Hills carpenter James Burgess (the union president, who was also honoring the picket line and distributing authorization cards), Stewart was approached by Green Hills Superintendent McBrayer and Green Hills Foreman Taylor. Taylor asked Stewart to explain to McBrayer the nature and purpose of the authorization cards. Stewart said that if the Union got 30 percent of the ''votes,'' the Union could get an election, and if 51 percent of the employees voted for the Union in such an election, Respondent would have to negotiate with it. After Stewart had given this explanation, McBrayer said that he did not want the employees to do this on ''his time''; and that he wondered if the election would be held while the Green Hills job was still in progress. Stewart replied that he did not know, but believed it to be unlikely.[3]

So far as the record shows, all the employees who honored the picket line were permitted to return to work on request. Burgess and Stewart, who honored the picket line until it was withdrawn, were surprised and elated that Taylor and McBrayer permitted them to return.[4] Employees Rick Beattie and Davis, when they returned to work 2 days before the picket line was withdrawn, were told by Foreman Taylor, who had been driving them to and from work for $2 a day, that he did not want them to ride with him any more for the reason that ''a man in his position couldn't be seen riding with [them] like that,'' because ''it would hurt him on his job.'' On dates not clear in the record, Taylor told Davis that Taylor thought the union activity on the Green Hills job was hurting the work, that Taylor was ''a superintendent right now,'' and ''I can't really be socializing with you.''

On September 6, 1990, the Union filed a representation petition in Case 26–RC–7307, requesting essentially a unit of Respondent's carpenters employed in Davidson, Williamson, and Wilson Counties, Tennessee. At the first day of the hearing on the petition, on September 19, 1990, Burgess testified on the Union's behalf. On Monday, October 8, he came to the job a few minutes early, and met at the gang box (where the carpenters got their tools) with a group which included several fellow rank-and-file carpenters and Foreman Taylor. Burgess asked if any of them, including Taylor, would like union T-shirts and union caps. Burgess took the sizes of those who said they wanted these items, including Taylor. Taylor said that he would appreciate it if Burgess did not ''get caught'' doing this on ''company time;'' Burgess said that would be no problem. Foremen Taylor and Johnny Morgan later received union caps and T-shirts, but did not wear them.

That day, October 8, Burgess and his helper, Ralph Smith (see infra), were relaminating and installing partitions in the men's restroom on the second floor. About 3 p.m. that day, Foreman Taylor approached them and told them not to come in on the following day, October 9. Taylor said that Respondent had failed to receive a shipment of materials; that it was Respondent's policy to send people home instead of laying them off; and that Burgess should call in on October 9 to see whether he was needed on the following day. Respondent's payroll record for that job states that Smith quit on October 9.[5] Foreman Taylor, whom Respondent called as a witness, was not asked about this matter. Accordingly, I find that on October 9 Burgess and Ralph Smith were on layoff status. When told on October 8 to stay home on Octo-

[2] Ralph Smith appears on Respondent's records as A. Smith (see infra fn. 5).

[3] The complaint contains no unfair labor practice allegations based on this incident.

[4] Taylor testified that when he told McBrayer that Burgess and Stewart did not know whether they had a job and wanted to go back to work, McBrayer ''said that he didn't have any problem, we had work at the time.'' See *NLRB v. Fleetwood Trailer*, 389 U.S. 375, 378–381 (1967).

[5] Although the payroll record attaches this entry to the name ''A. Smith,''both Respondent's counsel and the General Counsel agreed that this is the same individual as Ralph Smith.

ber 9, Burgess and Smith had all the materials they needed for the job. When Burgess returned to the job on October 10, he found that the same materials were there which had been there on October 8, and that some men's restroom work which had not been performed as of the end of the workday on October 8 had been performed in his absence. Taylor testified that in September and early October, when there was a lack of materials on the job, Respondent cut back everyone's hours from 10 to 8.

Except as otherwise expressly indicated, my findings in the foregoing paragraph are based on Respondent's records and on a composite of credible parts of the testimony of Burgess and carpenter Danny Cason. Cason testified that he heard Taylor tell Burgess on October 8 that he and Smith would not be needed the next day, and further testified that on that day Smith was Burgess' helper and helper William Wooten was Cason's partner. Taylor testified that he ''would think'' Wooten was Cason's partner during the first 2 weeks of October, and was not asked about the layoff interview. For demeanor reasons, and in view of Taylor's failure to testify about the layoff interview, I credit the testimony of Burgess and Cason that Taylor told Burgess and his helper on October 8 to stay home on October 9, credit Cason's testimony that Smith and not Wooten was Burgess' helper on October 8, and conclude that Burgess was mistaken in identifying his helper as Wooten.[6] Although it is true that Burgess' timesheet states that he worked 8 hours a day between October 8 and 12 inclusive, Burgess testified without testimonial contradiction that these entries were not on the timesheet when he signed it; that ''a lot of times'' the time sheets were blank when the employees signed them and the employees were told that Respondent would fill them out later; and that on October 9 he attended, although he did not testify at, the second day of the representation case hearing. Some indirect support for Burgess' testimony about Respondent's timesheet practice is provided by the fact that the timesheet for that week for Ralph Smith, which contains his at least purported signature, states that he worked 8 hours on Wednesday, October 10, even though Respondent's payroll records state that he quit on October 9.[7]

[6] Neither Smith nor Wooten testified. Assuming that the complaint were sustained as to Smith, he would be entitled to 1 day's backpay at most. Wooten died before the hearing. As to Wooten's death, I rely on a news clipping, attached to the General Counsel's posthearing brief, which states that on March 7, 1991, the day after the hearing ended, Wooten's dead body was found floating in a lake and appeared to have been in the water for several weeks. Respondent has not questioned either the accuracy of this clipping, or counsel for the General Counsel's averment that as of the date she submitted this clipping, no public document was as yet available regarding Wooten's death.

[7] Wooten worked 40 hours during the payroll week ending October 10, but his individual timesheet is not in evidence. Respondent does not pay overtime rates unless and until the employee has worked more than 40 hours during the current payroll week, uses a payroll week which ends on Wednesdays, and pays employees every 2 weeks on the basis of 2 payroll weeks. Accordingly, and because the individual timesheets each cover a calendar rather than a payroll week, a misallocation of hours between days or consecutive weeks on the individual timesheets would not necessarily affect the size of the employee's paycheck.

C. *Alleged Postpetition Interference, Restraint, and Coercion*

1. Distribution of union T-shirts and caps

While performing the Green Hills Mall job, Respondent maintained a parking lot for its employees at a nearby church. Most of Respondent's employees, including Burgess, were supposed to park in that lot, rather than the mall parking lot maintained for customers, and were then shuttled to the jobsite. Before the start of the workday on October 10, Burgess parked his car in the church parking lot, where he waited in the expectation of delivering the union caps and T-shirts ordered by some of his fellow employees. However, only two employees showed up to claim them. Foreman Taylor, who had asked Burgess for a union T-shirt and cap, was supposed to drive Burgess from the church parking lot to the job, but he drove by and left Burgess standing there. Then, Burgess drove his own car to the Green Hills Mall parking garage and parked there. He distributed some caps and T-shirts there, before the start of the working day, and the rest at lunchtime that day. That same day, on what employee Cason testimonially described as ''not on company time,'' Burgess passed out to his fellow employees copies of a pamphlet whose contents consist of a 36-page printed contract (3-1/2 by 5-1/2 inches) between the Union and certain contractors, but whose cover bears the title ''Working Rules/Carpenters Local Union 223.'' This contract, effective in July 1990, calls for higher wages and more generous overtime and weekend pay than Respondent was affording, and also calls for employer payments into various trust funds.

The Green Hills job consisted of remodelling and enlarging an existing mall store operated by Dillard's. Shortly before 3 p.m. on October 10, Dillard's store manager, its construction representative, and McBrayer went into the first-floor men's shoe department, where remodeling was then in progress and from which (inferentially) customers were at that time excluded. Lying beside the toolboxes of the three carpenters working in the area were union caps, union T-shirts, and ''Working Rules'' pamphlets. On receiving an at least implied complaint from the store manager, McBrayer approached Burgess, who was working in the second floor men's bathroom, and asked him to step outside into a hallway. Then, McBrayer asked Burgess what was going on. Burgess replied that he did not know what McBrayer was talking about. Using an obscenity, McBrayer accused Burgess of ''not playing fair.'' McBrayer said that he had tried to work with Burgess and had bent over backwards, and asked what he was doing with ''all those T-shirts . . . laying around.'' Burgess said that he did not see that the shirts were hurting anybody. McBrayer said that Burgess had hurt his feelings, and further said that a ''whole pile'' of union ''books'' was sitting on the first floor. Burgess said that he did not know what ''books'' McBrayer was talking about, and that Burgess was not responsible for them. Burgess asked McBrayer to show him this ''pile'' of ''books.'' McBrayer escorted Burgess downstairs to the men's shoe department and showed him the T-shirts, caps, and contracts lying beside the carpenters' work tools. McBrayer said that he did not mind the caps and the T-shirts, but that ''the working rules are going too far . . . they're laying around everywhere.'' McBrayer said that the was ''not real happy'' that this material had been ''drug around in front of'' him

in the presence of the Dillard representatives, and asked Burgess to keep the literature out of their sight. McBrayer went on to say that Burgess had a right to pass this information out, but that he was not to distribute anything during ''his [McBrayer's] time,'' ''company time'' or (perhaps) ''working time;'' that Burgess was not supposed to pass out anything ''on the property; pass it out on the parking lot;'' and that thereafter, Burgess was going to have to leave this material in the car and pass it out from the car. Burgess said that he did not know how he had hurt McBrayer or anyone else, that what Burgess did on his own time was his own business, and that when the material left his hands, it was not his property, but belonged to someone else. Burgess asked what he had hurt. McBrayer replied, ''Well, I don't guess you've hurt anything except for my feelings . . . I give you a chance for a job and now you start all this Union bull . . . I feel like I've been doing you men fair and you're not being fair with me.'' Burgess said that he got his own feelings hurt all the time, but did not see where he had broken any law. McBrayer said, ''Well, I don't guess you have . . . I appreciate your time and everything . . . but this has gone too damn far.''[8]

Employee Stewart helped pass out to Respondent's other Green Hills carpenters the union caps and union T-shirts for which employee Burgess had obtained employee orders on October 8 and which he brought to the jobsite on October 10. On observing Stewart's activity, Foreman Taylor told him not to do this on ''company time.'' Stewart assured him that the distribution would be through before the 7 a.m. starting hour, and Taylor said that was fine. A day or two later, when Stewart had come to the office to obtain some supplies, Superintendent McBrayer told him that McBrayer liked the union T-shirt Stewart was wearing. Stewart asked McBrayer whether he would like to have one. McBrayer said, ''No, thank you.'' Then, his expression became angry. He said that he was disappointed in Stewart and Burgess because of their ''activities,'' and that McBrayer ''thought that [they] were going to shoot him straight on this.'' Stewart said that he thought he was doing what was best for himself, his family, and the Union, and that Stewart was sorry McBrayer felt that way.

2. Processing of the representation petition

On October 18, 1990, pursuant to the Union's representation petition, the Regional Director for Region 26 issued a Decision and Direction of Election which found appropriate a unit of carpenters, apprentice carpenters, and carpenters' helpers employed by the Company in Davidson, Williamson, and Wilson Counties in Tennessee. The Regional Director's Decision recites that the Company wanted to confine the unit to the Company's Green Hills job. The Direction of Election consisted of the language on the printed form frequently used for such decisions, and stated, in part, ''Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision [that is, the payroll period ending on October 10 or (more likely) 17],[9] including employees who did not work during that period because they were . . . temporarily laid off . . . Ineligible to vote are employees who have . . . been discharged for cause since the designated payroll period . . . and who have not been rehired or reinstated before the election date.'' The Regional Director further found that 13 named individuals were eligible to vote whether or not they would otherwise have been rendered eligible by the foregoing language, on the ground that they met the criteria of *Daniel Construction Co*., 133 NLRB 264 (1961), modified 167 NLRB 1081 (1967)—namely, they had been employed by Respondent ''for 30 days or more during the 12 months preceding the eligibility date or were employed for 45 days or more in the 24 months preceding the eligibility date.'' Among these named employees were Aldridge, Cason, Harrelson, Harrington, and Wooten. Cason and Wooten had previously worn union T-shirts on the job; Aldridge and Harrelson had not worn such shirts; and the record is silent as to Harrington. In addition, the Regional Director's decision stated:

> Burgess testified that at the time he was hired McBrayer, his superintendent, told him that the Employer had two [years'] worth of work in the middle Tennessee area, including [an] installation [project] at Hickory Hollow Mall [in Davidson County]. Company president [Jack] Boler acknowledged that McBrayer probably made the statements to Burgess. Burgess also testified that McBrayer told him that upon completion of the Green Hills project, the best employees would have the opportunity to go to the Hickory Hollow installation project.
>
> Another carpenter employed by the Employer, James Michael Stewart, also testified, without contradiction, that superintendent McBrayer told Burgess and him at the time of their application for employment that the Employer had between 18 months and two years of employment opportunities in the area for ''key'' employees, and that these ''key'' employees would begin the Hickory Hollow project upon completion of the Green Hills Mall project.

The Board's formal file in Washington, D.C., of which I take official notice, shows that on October 29, 1990, the parties agreed that the election would be held on November 15, 1990, at a job trailer at the Green Hills Mall. That file further shows that about October 31, 1990, Respondent's counsel filed a request for review of the Regional Director's decision. That request for review reiterated Respondent's contention to the Regional Director that the unit should be limited to the Green Hills job. In addition, the request for review stated that the *Daniel's* eligibility formula was inapplicable because, among other things, there was no evidence that Respondent effected temporary layoffs. The request for review further stated that it was possible that by the agreed on election date all work on the Green Hills job would be com-

[8] My findings in this paragraph are based on a composite of credible parts of the testimony of employee Cason (who was then working about 20 feet from the Burgess-McBrayer conversation in the hallway), employee Davis (who was then working on the other side of the bathroom wall), Foreman Johnny Morgan (who overheard the latter part of the McBrayer-Burgess conversation), Burgess, and McBrayer.

[9] My inference that the relevant 2-week payroll period likely ended on October 17 is based on the fact that each page of Respondent's payroll records for these payroll weeks covers both weeks but not others.

pleted,[10] and that if this turned out to be the case, Respondent believed that nobody could properly be held eligible to vote.

On November 14, 1990, the day before the election, the Board granted the request for review on the ground that it raised substantial issues warranting review. Accordingly, the ballots cast in the election on November 15 were impounded. At that election, Burgess voted and acted as the Union's observer.

3. Further alleged preelection interference, restraint, and coercion

Employee Michael McCutcheon wore a union T-shirt and hat two or three times after their October 10 distribution. On two or three occasions during the month before the election, he asked his foreman, admitted supervisor, Johnny Morgan, ''if we voted for the Union, what was the chances of us getting a job out there at Hickory Hollow,'' where Respondent was about to start another job. On each such occasion, Morgan replied, ''None.''[11] On one or two occasions during this same period, McCutcheon asked Foreman Taylor, while both of them were working, ''if I voted for the Union, would I have any chance of getting a job out there at Hickory Hollow?'' Taylor said no, and that McCutcheon's best bet was not to vote for the Union, and then he would have a chance of getting a job out there.

A week or two before the election, in the presence of employee Ronald Skipper, employee Rick Beattie asked Supervisor Johnny Morgan about going to work at the Hickory Hollow Mall job. He said, ''That depends.'' Beattie said, ''Depends on what?'' Morgan looked at Beattie and said, ''I think you know.''[12] Beattie had worn his union T-shirt and cap to work on alternate days since receiving these garments, and had honored the picket line for all but the last 2 days. He had also told McBrayer that Beattie was going to vote for the Union and do what he could to see that ''it went union,'' to which McBrayer replied that he appreciated Beattie's honesty.

About a week before the election, Superintendent McBrayer approached all of 12 employees who were working within view of employee McCutcheon, and gave each of them a T-shirt and hat bearing the company logo, along with a letter urging a vote against the Union (see infra fn. 34). McCutcheon—who had previously requested, received, and worn a union T-shirt and hat—accepted and wore this company clothing from McBrayer. McCutcheon credibly testified that he had not asked for this company clothing and, so far as he knew, neither had any of the other employees. On November 12, Burgess, who had been laid off a month earlier, came down to the jobsite in order to distribute to the employees during their meal break a letter in response to the letter they had received with the company T-shirts and hats. Before seeing the employees, he encountered McBrayer on the second floor of the store the Company was remodeling. Burgess told McBrayer that Burgess understood why McBrayer was ''for the Company,'' that it was taking good care of him, but ''these other guys, none of them have a pension or health or welfare.'' Burgess said that he like ''y' all's'' T-shirts and caps, that they looked nice, but that Burgess liked ''ours'' better. McBrayer said, ''Yeah, tick for tack . . . you're doing nothing but hurting these union guys, sympathizers.'' Burgess asked what he was talking about. McBrayer said that what Burgess was doing would ''hurt their employment with'' the Company, and that ''It is all politics, you know that.''

A few days before the election, Foreman Johnny Morgan told employee Cason, ''in confidence as a friend,'' that if he played his cards right, he could secure a position with Oklahoma Fixture, one of Respondent's suppliers. Morgan went on to say that Union Business Agent Bobby Boner had been doing nothing for ''us;'' and that Burgess was not going to do anything for ''us'' other than run for a state union office after telling ''us'' he would run for a Local position. Morgan said that he was ''just going to have to go with the Company;'' Cason said that he thought he would stick with the Union.

Around the time of the election, employees McCutcheon and Beattie, both of whom had worn union T-shirts on the job, and Supervisor Taylor engaged in a discussion about ''what the Union had to offer and what [the Company] had to offer.'' McCutcheon expressed the view that the way ''we'' had presented the Union's case was much fairer than the conduct of ''someone around here on this job that's running around threatening people to vote 'No' against the Union.'' Taylor asked who was engaging in this conduct. Beattie did not want to tell him;[13] but asked Taylor what he thought about that. Taylor replied, ''I may have said that by voting for the Union, it could hurt their chances of going to another job with [Respondent].''

4. Alleged postelection interference, restraint, and coercion

A day or two after the election, employee Skipper, who had honored the picket line and had worn a union hat and T-shirt on the job two or three times a week since receiving them about October 10, asked Supervisor Johnny Morgan what ''kind of chances would we have to go to the Hickory Hollow Mall after all this.'' Morgan replied, ''Well, I think you know the answer to that.'' Skipper said, ''Well, I don't guess we'd have much of a chance then.'' Morgan said,

[10] The job was supposed to be completed by that date, but was not substantially completed until November 21 and (according to Foreman Taylor) was not wholly completed until after the January holiday sales had been held. The payroll records in evidence show that Respondent continued to perform work on this job until at least the payroll week ending December 19, the last week covered by these records.

[11] This finding is based on McCutcheon's testimony. For demeanor reasons, I do not accept Morgan's general denial. In connection with Morgan's reliability, I note that the Company discharged him from the Hickory Hollow job in February 1991 for falsifying a company sign-in sheet. This evidence suggests that he may have little respect for the truth, that he may entertain animus against the Company, and/or that he may wish to ingratiate himself with the Company in order to obtain work on other projects.

[12] My findings as to this conversation are based on Beattie's testimony. Although Skipper was not asked about this conversation, for demeanor reasons I credit Beattie over Morgan's rather equivocal and conclusionary denial.

[13] Beattie testified at the hearing that during the conversation with Taylor Beattie was referring to ''rumors'' that such conduct had been engaged in by Supervisor Johnny Morgan. On timely objection, Beattie's testimony in this respect was not received to show the truth of these ''rumors.''

''That's about right.'' Skipper testified that by the words ''all of this,'' he was referring to the outcome of the election, where the ballots had been impounded.[14]

D. *The Allegedly Unlawful Layoff of Employees Burgess, Stewart, Davis, and Wooten from the Green Hills Job on October 12*

On Friday, October 12, Respondent permanently laid off four carpenters and helpers—Burgess, Stewart, Davis, and Wooten—from the Green Hills job; these comprised about a sixth of the nonsupervisory carpenters and helpers on that job. Respondent's counsel stated at the outset of the hearing that these employees were laid off

> [B]ecause the job was coming to a close. . . . the Green Hills job . . . was scheduled to finish around the 16th day of November, 1990, and in fact finished the week of November 23rd, which is the week of Thanksgiving [cf. supra fn. 10]. Historically . . . in a remodel situation such as the Green Hills . . . the big push is on to get a job finished before Thanksgiving, because . . . between Thanksgiving and Christmas . . . is the time of year that they merchandise their largest retail volume, and they want us out of the store.

The testimony of McBrayer, Morgan, and Taylor indicates that the decision to effect the October 12 layoff, and how many employees to lay off, was made by McBrayer. McBrayer, who at the time of the hearing was a supervisor in Respondent's employ and was called by it as a witness, was not specifically asked why he decided to effect a layoff on October 12, or the number he decided to lay off.

During the last two full payroll weeks preceding the layoff, the week of the layoff, and the first full payroll week after the layoff—that is, during the payroll weeks ending on October 3, 10, 17, and 24—Respondent's nonsupervisory carpenters and helpers worked an average of about 2.5 hours' overtime a week each, with an individual maximum during this period of 12.5 hours during 1 week. During this period, the total overtime worked on the job by carpenters and helpers varied between about 52 and 58 hours per week. Carpenter Cason testified that after the October 12 layoffs, management wanted the carpenters to work as many hours as they would; and that McBrayer said that the carpenters were going to work 7 days a week and 12 hours a day (although ''it didn't work exactly that way. We didn't work all those hours''). I credit this testimony by Cason, which was not denied by McBrayer or by any other member of management and which is corroborated by Respondent's payroll records.[15] More specifically: During the payroll week ending on October 31, Respondent's carpenters and helpers worked a total of about 184 hours of overtime, with an average of about 10 hours each and an individual maximum of about 23. During the payroll week ending on November 7, these employees worked a total of about 320 hours of overtime, with an average of about 16 hours each and an individual maximum of about 26. During the payroll week ending November 14, these employees worked a total of about 280 hours of overtime, with an average of about 17 each and an individual maximum of about 27. During the payroll period ending November 21, these employees worked a total of about 527 hours of overtime, with an average of about 29 each and an individual maximum of about 38 hours (worked by two people).[16] During the last day or two of this period, the three foremen for the first time worked with their tools alongside the rank-and-file carpenters.

Johnny Morgan, whom Burgess testimonially identified as his foreman at the time of Burgess' October 12 layoff, and McBrayer testified that it was Morgan who selected Burgess to be included in that layoff. Morgan testified that he selected Burgess because ''that day'' Burgess and employee Jessie Northcott had been installing laminate, Northcott had done most or a lot of the laminate work by himself, Northcott was a more qualified laminate repairer and installer than Burgess, and Respondent by the time of the layoff was running ''pretty short on the laminate work.'' McBrayer testified that Burgess was selected for layoff because one man was capable of finishing the laminate job and Northcott had had considerable experience in laminate.[17] Northcott was being paid $11.50 an hour, and Burgess was being paid $12.50, which was Respondent's then top rate for journeyman carpenters and was received by about 6 of Respondent's approximately 19 nonsupervisory carpenters. Burgess' hourly rate had been increased from $11.50 to $12.50 within 2 weeks after his hire on the Green Hills job. When he applied for work there, McBrayer had told him that he would receive such an increase after a couple of weeks if he proved to be a good hand. He received this increase without going to McBrayer about it, and, when advising him of the increase, Foreman Taylor told him that he was doing a good job and to keep up the good work.[18] Foreman Johnny Morgan had recommended Burgess for hire and, when he was working on that job, described him as a ''really good trim carpenter.'' Northcott wore a union T-shirt and cap on the job after their distribution on October 10 (2 days before the layoff), but there is no evidence that he engaged in any other union activity.

McBrayer and Taylor testified that it was Taylor who selected Stewart, Davis, and Wooten for layoff. As to the reasons which Taylor gave McBrayer for their selection, McBrayer testified that these three employees ''could all be grouped together, I think. Their projects . . . were starting to wind, but also it had been expressed to me that they were no longer following directions as easily as they had in the

[14] My findings in this paragraph are based on Skipper's testimony. For demeanor reasons, I do not believe the version of this conversation given by Morgan, who testified to telling Skipper that as to his chances of getting a job at Hickory Hollow, ''he ought to know that for hisself.''

[15] Cason himself worked 18 hours of overtime the week ending November 14 and 33 hours of overtime the week ending November 21.

[16] The total overtime for the week ending November 21 may have been higher. The payroll record for the week ending November 28, which sets forth about 38 hours of overtime, contains the notation ''O/T from previous week.''

[17] I can find nothing in the record to support the assertion in the G.C. Br. 14 that on the day of the layoff, Northcott was not Burgess' partner.

[18] My findings in this sentence are based on Burgess' testimony. To the extent inconsistent, for demeanor reasons I do not credit McBrayer's testimony that Burgess received more than Northcott solely because Burgess had definitely asked for the $12.50 and Northcott had not. Taylor was not asked about this matter.

past.'' It is undenied that immediately after Stewart was advised of his layoff, McBrayer said that he appreciated the job Stewart had done for him and Stewart had done a good job for McBrayer. As to why Taylor selected Stewart, Taylor testified:

> Well, Mike had been a pretty good carpenter, but when it came down to when all the . . . I don't know, animosity between everybody came through, his attitude toward his job became very poor. He had a hard time taking instructions from me. I'd ask him to do something and he would deliberately usurp my authority and do something contradictive.
>
> It's kind of like my kids, you know, I don't have to tell my kids why I tell them what to do, but yet he thought that I had to explain every nook and cranny of why he was supposed to do it that way.

When asked whether he was referring to the time of the picket line and the union petition in stating ''when the animosity came up,'' Taylor testified, ''I meant that as a cumulative time. That had one part of the animosity on the job.'' As to why he selected Davis and Wooten for layoff, Taylor testified on direct examination that ''they were working in a shoe stockroom, and the men's shoe stockroom was a large stockroom, and it was a double deck stockroom, so it utilized a lot of space, and that part of the job was ending.'' However, on cross-examination, Taylor testified that during the first 2 weeks of October (the layoffs occurred on October 12), ''I would think'' that Wooten was working on the main floor men's bathroom, with Cason as his partner.

Taylor testified that Stewart's conduct in testifying at the representation-case hearing was not discussed during the management conference about whom to select for layoff, and that Taylor and McBrayer did not then discuss Stewart's union membership or activity. Morgan testified that when he recommended Burgess' selection for layoff, there was no discussion about Burgess' conduct in testifying ''in a Court proceeding against the Company'' or his union activities. McBrayer at the time of the March 1991 hearing was a member in good standing of Carpenters Local 429 in Arlington, Texas, of which he had been a member for 14 years. Taylor has been a member of the Union since 1987, and observed the picket line for 1 day (see, supra, sec. II,B). Morgan, too, is a member of the Union, to which he transferred from a Florida local when he moved his residence, and honored the picket line for at least 1 day (see, supra, sec. II,B). McBrayer knew when interviewing Burgess and Stewart for hire that they were the union president and the union secretary, respectively. Taylor and McBrayer knew when Davis was hired that he had dropped out of the Union, and McBrayer had told Taylor he could hire Davis ''since he dropped out.''

The union activity of Burgess and Stewart before their October 12 layoff is summarized, supra, section II,B,C,1. Davis honored the picket line for all but the last 2 days it was up; as previously noted (supra, sec. II,B), on his return to work, Foreman Taylor stopped driving him to and from work because (Taylor said) to be seen riding with Davis would hurt Taylor on his job. In September, Davis distributed union cards among the other workers. Foreman Taylor, who was the first person Davis gave a card to, told Davis that McBrayer said he did not care whether or not the employees gave out union cards, as long as the employees did not do it on ''his time'' and in front of Dillard's customers. On one occasion when a helper was signing a union card in Davis' presence before the beginning of the lunchbreak, in a location where they could be seen only by someone coming down the escalator, McBrayer came down the escalator and ended up 5 or 6 feet away from Davis. In addition, Davis wore a union T-shirt on the job each of the last 3 days he worked on the Green Hills job. Wooten wore union T-shirts and hats, and orally expressed support for the Union. Of the approximately 22 carpenters and helpers who worked during the payroll week ending October 17, about 13 wore union T-shirts and/or hats on the job (Bates on only the day he received his shirt, Beattie, Burgess, Cason, Davis, Hadden, McCutcheon, Northcott, Parker, Skipper, Stewart, Wood, and Wooten) and about 8 did not (Aldridge, Armstrong, Cunningham, Dickens, Guinn, Harrelson, Mevis, and B. Morgan);[19] the record fails to show whether such clothing was worn by Harrington. Of the nine employees who are shown to have worn such union clothing on the job and were not laid off on October 12, the complaint alleges that five (Beattie, Cason, McCutcheon, Skipper, and Wood), as well as Burgess, Davis, and Stewart, were unlawfully denied jobs on Respondent's Hickory Hollow job.

E. *The Alleged Unlawful Failure and Refusal to Hire Beattie, Burgess, Cason, Davis, McCutcheon, Skipper, Stewart, and Wood at the Hickory Hollow job*

1. The Hickory Hollow job

On an undisclosed date in 1990, Respondent obtained a contract for the installation of fixtures at a new Dillard's store in Hickory Hollow Mall, Davidson County, Tennessee. Respondent hired its first nonsupervisory carpenters and helpers for this job on November 25, 1990, and continued this hiring process until at least January 24, 1991. Of the approximately 63 persons hired by Respondent during this period as nonsupervisory carpenters and helpers, about 14 had worked for Respondent at the Green Hills project and about 16 had worked for Respondent at the Bellevue project.[20] Hiring for the Hickory Hollow job was done by Superintendent Klint Traylor, an admitted supervisor who unexplainedly did not testify. Between November 26, 1990 (the date on which alleged discriminatees first filed applications for employment) and February 4, 1991, Respondent received job applications from at least 56 applicants (other than the alleged discriminatees) whom it did not hire.

2. The alleged discriminatees' alleged applications for work at the Hickory Hollow job

a. *Cason*

Cason is a journeyman carpenter with over 10 years' experience, who was hired by McBrayer for the Green Hills job in March 1990 and worked there until November 21, 1990,

[19] Dickens and Guinn may have been union members, at least at some time. However, they openly expressed opposition to the Union when they were on the Green Hills job.

[20] Each of these numbers includes about four who worked at both Green Hills and Bellevue.

when he was laid off from that job. During the hiring interview, McBrayer said that he had about 2 or 3 years' worth of work for the ''right people'' and if Cason was ''his type of man,'' that McBrayer had work at Bellevue and Hickory Hollow. McBrayer asked Cason what the ''union scale'' was in the area. When Cason said $12.50 an hour, McBrayer said that Cason would initially be paid $11.50 an hour, but would be raised to $12.50 an hour if he was ''worth it.'' Cason received this increase effective June 7, 1990.

As McBrayer knew when hiring him, Cason has been a member of the Union at all times material here. He honored the picket line for 2 or 3 days; wore a union jacket every day; and wore a union T-shirt every other day after their October 10 distribution.

When laying Cason off from the Green Hills job on November 21, 1990 (the day before Thanksgiving), Foreman Lanny McGaugh (admittedly a supervisor) told him that he could go over to and check with the Hickory Hollow job, that this job was going to be needing a lot of carpenters. On Monday, November 26, Cason went to the Hickory Hollow job; filed a written application, which stated (inter alia) that he had worked for Respondent between March and November 1990; and had an oral interview with Traylor. While working at the Green Hills job, Cason had worked weekends at the Bellevue job under Traylor. During this November 26 interview, Traylor said that he did not need Cason ''right then,'' but that Traylor had three trucks coming in the next week, and that Cason should come in at 6 or 7 a.m. on Monday, December 3, that Traylor thought he could use Cason then. Between November 27 and December 2, Respondent hired about 14 nonsupervisory carpenters and helpers at the Hickory Hollow project.

In accordance with Traylor's November 26 suggestion, on Monday, December 3, Cason came in to talk about the matter with Traylor, who said, ''I just got these men in from out of town, . . . we're just going to have to play it by ear,'' and that Cason should check back again in a few days. After that date, and until January 14 or 15, 1991, Cason came in on seven more occasions to talk about the matter with Traylor, who on each such occasion made substantially the same statements he had made on December 3. In addition, Cason telephoned about the Hickory Hollow job on three occasions between December 3 and about January 16. During the first two calls, he reached Traylor, who told him about the same thing Traylor had told him in person. On the third occasion, Cason reached Traylor's secretary, who said that Respondent would call Cason if he was needed, that ''things looked pretty good,'' and that ''they were coming right along with the job.'' Cason was never hired for that job. Between December 3 and January 24, 1991, Respondent hired about 37 nonsupervisory carpenters and helpers for the Hickory Hollow job.

b. *McCutcheon*

McCutcheon was hired by McBrayer for the Green Hills job about June 13, 1990. During the hiring interview, McBrayer said that Respondent had several other jobs to do in the Nashville area, like Hickory Hollow and Cool Springs, and that ''more than likely,'' management would pick out ''all the best employees . . . the better carpenters, and they would be the ones to get to go to the other stores.''[21] Respondent's payroll records state that McCutcheon's hiring rate was $9 an hour. About November 1, 1990, he requested a raise, and received an increase to $10 an hour. McCutcheon has never been a member of any local carpenters union. His overt union activity is summarized, supra, section II,C,3.

Like Cason, McCutcheon was laid off from the Green Hills job on November 21, and went to the Hickory Hills project on November 26 in search of a job. That day, he filled out an application blank (which is not in evidence) and talked to Traylor, who said that he did not need any help, and that McCutcheon should come back in a week when all the fixtures would be there. Between November 27 and December 2, Respondent hired about 18 carpenters and helpers for the Hickory Hollow job. When McCutcheon came back on December 3, Traylor's secretary told McCutcheon that she had lost his application, and he filled out another one, which stated that he had worked for Respondent at the Green Hills job. That day, Traylor told McCutcheon that Traylor had already hired everyone that he needed. Between December 4 and 10, Respondent hired about 15 nonsupervisory carpenters and helpers. McCutcheon came out to the job a third time, about December 10, but was told that ''they just wouldn't need no help.'' Between this third and last visit and January 24, 1991, Respondent hired about 16 nonsupervisory carpenters and helpers for the Hickory Hill job. McCutcheon was never hired for the Hickory Hollow Job.

c. *Skipper*

Skipper was hired for the Green Hills job in mid-July 1990, at $11.50 an hour. About late October, he received a raise to $12.50. Foreman Johnny Morgan described him as a good trim carpenter. Nobody ever told him that his work on the Green Hills job had to be redone. Skipper is a journeyman carpenter with 6 years' experience (including 6 to 8 months as a trim carpenter before going on the Green Hills job), who trained in a union apprenticeship program. He honored the picket line for 3 or 4 days, and wore a union cap and T-shirt on the Green Hills job two or three times a week from his October 10 receipt of these garments until his layoff from that job on November 21.

After his November 21 layoff from that job, Skipper went down to the Hickory Hollow job, but found nobody in the office. He obtained an application blank from Foreman Ronnie Hays, took it home, filled it out, and took it back to the office about 2 days after receiving it. Finding nobody in the office, he slipped the application, which states that he had worked for Respondent on the Green Hills job and which he dated November 27, under the door. Respondent's Exhibit 3 states that he applied for work on November 27. Between November 28 and December 3, Respondent hired about 20 nonsupervisory carpenters and helpers for the Hickory Hollow job. About December 4, Skipper returned to Respondent's office and spoke to a secretary, who told him that there was not going to be any hiring until after the first of the year. Between December 5 and January 1, Respondent hired

[21] Although not asked about his hiring interview with McCutcheon, McBrayer testified that he knew nothing about any Mount Juliet job. I find it unnecessary to determine whether this job was mentioned, as testified to by McCutcheon. Cf. infra fns. 22, 24.

about 18 nonsupervisory carpenters and helpers for the Hickory Hollow job. In mid-January 1991, Skipper again went to the Hickory Hollow jobsite, identified himself to Traylor, and said that Skipper was there about a carpenter's job. Traylor said that he was not going to be hiring any more carpenters. Between January 15 and 24, about six more carpenters were hired for the Hickory Hollow job. Skipper was never hired for that job.

d. *Beattie and Wood*

Journeyman carpenter Beattie was hired for the Green Hills job by McBrayer about mid-June 1990 at $11.50 an hour. During the hiring interview, McBrayer said that if he liked Beattie's work after 2 weeks, he would receive a $1 hourly increase. Respondent's payroll records show that Beattie received that increase about 2 weeks later, and continued to work on that job until being laid off on November 21. Before the Union filed its representation petition on September 6, Beattie heard that Respondent had the Hickory Hollow job, and asked McBrayer about ''possibly going on other jobs.'' McBrayer said to ''just keep doing what you're doing,'' that ''things looked pretty good,'' but that McBrayer could not promise him anything. Beattie's foremen inspected his work, but never asked him to redo anything. Beattie's overt union activity is described, supra, section II,C,3.

On November 27, Beattie and carpenter Don Guinn, both of whom had been laid off from the Green Hills job on November 21, came down to the Hickory Hollow job and talked to Superintendent Traylor. Traylor said that Respondent was going to be doing a lot of work there, and asked about their experience. Both of them said that they had been doing fixture work for a long time. Guinn asked whether, in view of ''that deal with the Union'' at the Green Hills job, Traylor was opposed to hiring ''someone'' or ''anybody'' who had worked on that job. Traylor said no, that the two jobs were separate. Beattie said that he had been working on the Green Hills job. Traylor wrote down the names of both men, and gave each of them an application blank to take home and fill out.

Wood was hired by McBrayer for the Green Hills job on June 30, 1990, as a carpenter's helper at $9 an hour. Two or three weeks later, Taylor, who was then Wood's foreman, told him that he was doing good work, that Taylor had told McBrayer that Wood needed a raise, and that Taylor had got Wood a 50-cent raise. At the time he went to work, Wood was not a member of the Union. However, he wore a union T-shirt and hat on the Green Hills job two or three times a week from his receipt of these garments, about October 10, until his November 21 layoff from the Green Hills job.

On November 28, Wood filled out a written application for work at the Hickory Hollow jobsite and gave it to Traylor. This application showed that he had worked for Respondent at the Green Hills jobsite. While Wood was talking to Traylor, Beattie came in with written application blanks filled out by himself and by Guinn. Beattie's application showed that he had worked for Respondent at the Green Hills jobsite. Traylor said that management did not know the Hickory Hollow start date ''for sure,'' because the fixtures had been slow to come in. He said that he would keep Beattie and Wood in mind, and get in touch with them as Respondent needed different carpenters. By that time, Respondent had hired about nine nonsupervisory carpenters and helpers for the job. On the following day, November 29, Respondent hired about 10 more. When Beattie first checked back with Traylor, about early December, Traylor said that ''a bunch of guys'' were coming in from Texas to fill in until the start of another job they were supposed to go on, and because he did not know how many there were, he could not hire anybody. He told Beattie to check back in a couple of weeks. Beattie did so before Christmas, but Traylor said that he really could not tell Beattie anything.

After Wood gave his application to Traylor on November 28, Wood returned to the Hickory Hollow jobsite on three or four occasions before the end of January. On the first such occasion, Traylor said that carpenters were coming in from Texas and Oklahoma, that he did not know how many were coming in, and that Wood should come back at noon to see how many had come in. When Wood did come back at noon, Traylor said that Respondent had a full crew. As Wood was leaving, he saw a man filling out an application. During subsequent visits to the jobsite, Wood asked Traylor's secretary if Respondent needed carpenters. She asked for his name, went to a file drawer, found his file, and then said, ''No, we have a full crew.'' Between November 29 and the end of January, Respondent hired about 53 nonsupervisory carpenters and helpers at the Hickory Hollow jobsite. Beattie and Wood were never hired for the Hickory Hollow job.

e. *Davis*

Davis is a journeyman carpenter who served his apprenticeship under union auspices. About mid-July 1990, he was hired for Respondent's Green Hills job by McBrayer, who told him during his job interview that the Green Hills job would probably last 5 to 6 months, that Respondent had about 15 or 16 months of work in the area, that a lot of the Green Hills employees would probably go to the Hickory Hollow job, and that probably, most of the Green Hills employees would be sent from that job to the Hickory Hollow or Cool Springs job.[22] McBrayer further said that Davis' hiring rate would be $11.50 an hour, but after 30 days, McBrayer would probably increase his wages to $12.50. On an undisclosed later date, Davis asked Foreman Taylor about a raise. He said that it would probably be done; but at the time of Davis' layoff from the Green Hills job, he was still receiving $11.50 an hour.

As noted, supra, section II,D, Davis was included in the allegedly discriminatory layoff on October 12. The first nonsupervisory carpenters and helpers on the Hickory Hollow job were hired on November 25. Without being asked to give dates, Davis credibly testified that he knew work was going on at Hickory Hollow, but did not apply at first because friends (whom he was not asked to name) had told him that because of their union activity, Respondent was not hiring them there.[23] About January 4, 1991, shortly before lunch time, he went to Respondent's office at the Hickory Hollow mall, where he saw Traylor and (on the telephone) Company President Jack Boler. Davis asked Traylor whether he was

[22] Although not asked about his hiring interview with Davis, McBrayer testified that he knew nothing about any Mount Juliet job. I find it unnecessary to determine whether this job was mentioned, as testified to by Davis. Cf., supra, fn. 21, infra, fn. 24.

[23] On timely objection, his testimony was not received to show the truth of these friends' report.

hiring any carpenters. Traylor asked whether Davis had ever done any kind of fixture work. Davis replied, ''Yes, at Green Hills.'' Traylor said he did not know where his secretary kept the applications, and asked Davis to return after lunch. By the time Davis returned after lunch, Traylor's secretary had returned to the office and Traylor was working on the floor. Traylor said that he was very busy, that Davis could put in an application if he wanted to, but that Traylor already had a full crew and did not think he was going to need anyone. Concluding that leaving a written application was useless, Davis walked away without filling one out. Davis was never hired for that job. Between January 5 and 24, Respondent hired about 12 nonsupervisory carpenters and helpers (including 3 on January 24) for the Hickory Hollow job. About three carpenters and helpers were terminated between January 2 and 4.

Company President Boler, who was in the Hickory Hollow office during Superintendent Traylor's job interview with Davis, testified at the September and October 1990 hearing in the representation proceeding in which Respondent sought to exclude the Hickory Hollow job from the Union's petitioned-for unit. A decision by Administrative Law Judge Joan Wieder, of which I take judicial notice (see infra, sec. II,G,2,a), on the basis of a hearing held on December 4 and 5, 1990, states (pp. 3–6) that Boler establishes Respondent's labor policies and relates them to the superintendents; and that in the spring of 1990, when demoting a foreman to journeyman on a job in the area of Houston, Texas, Boler told him that he ''had to learn the ways of the company'' and said that it would be good if he got out of ''the Union'' (Carpenters Local 233).

f. *Stewart and Burgess*

During the hiring interview with Stewart and Burgess about June 26, 1990, at Green Hills, McBrayer told them that Respondent had about 2 years of work in the area; that the Green Hills job would last until mid or late November and perhaps a little later; that the work at Hickory Hollow Mall would start about the first of December; and that Dillard's was going to build a store at Cool Springs. McBrayer further said that Respondent was going to take the good hands from Green Hills to Hickory Hollow.[24] McBrayer further told them that their hiring rate would be $11.50 an hour, but that he would give them $12.50 after a couple of weeks if they turned out to be good hands. He stated that he was not opposed to paying the union scale in the area, but he wanted to be sure that he was paying it to the people who were qualified to get it. Such an increase was received by Burgess before the beginning of his second week of employment, and by Stewart a week or two later. Burgess, at least, received this increase without asking McBrayer for it.

As previously noted, Burgess and Stewart were both included in the allegedly unlawful October 12 layoff at Green Hills. During the first week in December, Stewart telephoned Respondent's office at the Hickory Hollow project. An unidentified female answered the telephone. Stewart gave his name, said that he had worked at Green Hills, and asked whether job applications were then being accepted at Hickory Hollow. He testified, without objection or limitation, that she replied that applications were not being accepted ''right now.'' Respondent hired about 21 nonsupervisory carpenters and helpers at the Hickory Hill job between December 1 and 7; and about 2 between December 8 and 15. In addition, Respondent accepted about 15 written applications for such jobs between December 1 and 7, and about 14 between December 8 and 15, from applicants (other than the alleged discriminatees) whom it did not hire.

On January 14, Burgess and Stewart went to Respondent's office at the Hickory Hollow job. Only Traylor's secretary was in the office. Stewart asked her whether Respondent was going to be doing any hiring. She said that Respondent was taking applications, that several carpenters who had been transferred to Hickory Hollow from other jobs which had been temporarily shut down for the Christmas shopping season would be leaving about January 15, and that Respondent might need to fill at least some of those positions.[25] Then, Burgess and Stewart each gave the secretary a filled out application blank which stated that the applicant had previously worked for Respondent.[26] She asked each of them whether he had worked at Green Hills and, when they said yes, noted this on their application blanks. She said that Respondent would get in touch with them if it needed anyone. After leaving the office, Burgess and Stewart went out to the building site and introduced themselves to Traylor. He said that he knew them; they had worked under him at Respondent's Bellevue job during several weekends, and Traylor had complimented Stewart's work and expressed appreciation at these two employees' performance of weekend work to get Traylor ''out of a bind.'' The two employees asked if Respondent was going to be doing any hiring at Hickory Hollow. Traylor said that he had about 60 people there (in fact, he had about 43 rank-and-file carpenters and helpers), did not need anyone, and did not think he would need any carpenters any time soon. He further said that the Cool Springs Mall job would be starting up, and that he was going to be

[24] My findings in this sentence are based on Stewart's and Burgess' testimony. McBrayer testified that he ''possibly'' referred to ''potential'' jobs elsewhere, but that he could not remember what he said ''as far as exacts.'' Although he testified that at the time of this June 1990 interview he was not aware of any other work that Respondent had in the Nashville area, he further testified that he had heard in March 1990 that a new Dillard's store was to be built at Hickory Hollow, and ''if it's a Dillard's store, I'd think the possibility would be there'' that Respondent would have that job. McBrayer also testified in March 1991 that he knew nothing about a Mount Juliet jobsite, which Burgess (but not Stewart) testified that McBrayer mentioned during the job interview. I find it unnecessary to resolve the issue as to any Mount Juliet job. Cf., supra, fns. 21, 22.

[25] My finding that she made this statement is based on credible parts of Burgess' and Stewart's testimony. Stewart's testimony was offered and received without objection or limitation. Burgess' testimony was timely objected to by Respondent's counsel on hearsay grounds. I stated on the record that I was not receiving Burgess' testimony to show that what the secretary said was true, and neither the General Counsel nor union counsel has at any time questioned the propriety of this ruling. In view of subsequently adduced evidence indicating that Traylor's secretary had authority to receive applications, cf. Fed.R.Evid. 801(d)(2)(C)(D); see also *Communications Workers Local 6012 (Southwestern Bell Telephone Co.)*, 275 NLRB 1499, 1502 (1985).

[26] The complaint alleging that Respondent unlawfully refused to hire Burgess and Stewart was issued on February 13, 1991. Respondent's posthearing brief errs in asserting that this complaint preceded their written applications.

the superintendent there. Burgess asked whether he needed to go over there to fill out an application. Traylor said this would not be necessary, because he was going to take the applications from Hickory Hollow and would call them if he needed them. Burgess told him to let Burgess and Stewart know if Traylor needed any help. Neither Burgess nor Stewart was ever hired for the Hickory Hollow job. Respondent hired about two rank-and-file carpenters and helpers at Hickory Hollow on January 14 (the day of Burgess' and Stewart's written applications), about two on the following day, and about four between January 16 and 24.

F. *The Board's Decision in the Representation Case*

On December 10, 1991, after the close of the hearing in the instant unfair labor practice case, the Board issued its Decision on Review and Order in the representation case. *Oklahoma Installation Co*., 305 NLRB 812 (1991). The Board found appropriate a unit consisting of carpenters, apprentice carpenters and carpenter's helpers employed by the Company in Davidson County, Tennessee. As to voting eligibility, the Board affirmed the Regional Director's determination that 13 named individuals were eligible. The Board remanded the representation case to the Regional Director for action consistent with the Board's findings. The Board's formal files in Washington, D.C., fail to show what action, if any, was subsequently taken in connection with the representation case.

G. *Analysis and Conclusions*

1. The independent 8(a)(1) allegations

I find that Respondent violated Section 8(a)(1) of the Act when Green Hills Superintendent McBrayer, admittedly a supervisor, told employee Burgess on November 12, 1990, that Burgess' union activity and his distribution of union T-shirts and hats would hurt the employment with Respondent of the ''union guys, sympathizers.'' In addition, I find that Respondent violated Section 8(a)(1) when McBrayer told employee Burgess on October 10 that by starting all this ''Union bull'' and bringing union T-shirts and ''working rules'' onto the job and handing them out to employees, Burgess had hurt McBrayer's feelings; and when, about October 12, McBrayer told employee Stewart that McBrayer was ''disappointed'' in Stewart and Burgess for their union activities, that McBrayer had thought they were going to ''shoot straight'' with him. See *Downtown Toyota*, 276 NLRB 999, 1019 (1985); *Misericordia Hospital Medical Center*, 246 NLRB 351, 357 (1979), enfd. 623 F.2d 808 (2d Cir. 1980); *Metropolitan Life Insurance Co*., 256 NLRB 626, 633 (1981). Further, I find that Respondent violated Section 8(a)(1) when McBrayer distributed T-shirts and caps, bearing Respondent's logo, immediately after distributing letters from Respondent urging a ''no'' vote, and to employees who had not requested such garments. *Lott's Electric Co*., 293 NLRB 297, 304 (1989), enfd. mem. 891 F.2d 601 (3d Cir. 1989); *Houston Coca Cola Bottling Co*., 256 NLRB 520 (1981); *Maremont Corp*., 294 NLRB 11, 40 (1989). No different result is suggested by *Sterling Faucet Co*., 203 NLRB 1031, 1037 (1973), relied on by Respondent, where the company insignia in question were made available to employees at their request. Cf. *Lott's*, supra, 304.

In discussing the complaint allegations based on the conduct of Johnny Morgan and Taylor, neither of the posthearing briefs refers to the following portion of the Regional Director's Decision and Director of Election, issued on October 18, 1990, and unchanged by the Board in December 1991 in respects material here (emphasis in original):

> The parties also stipulated that *Lenny Taylor* [and] *Johnny Morgan*, . . . working foremen, were not supervisors within the meaning of the Act. Accordingly, in view of the stipulations of the parties, and in the absence of contrary record evidence, I shall include *Lenny Taylor* [and] *Johnny Morgan* . . . in the unit found appropriate herein.[27]

It is true that during the hearing before me, Respondent's counsel admitted Morgan's and Taylor's supervisory status after July 11 and June 27, 1990, respectively. However, in the leading case of *Montgomery Ward & Co*., 115 NLRB 645, 647 (1956), enfd. 242 F.2d 497 (2d Cir. 1957), cert. denied 355 U.S. 829 (1957), the Board said:

> Statements made by a supervisor violate Section 8(a)(1) of the Act when they reasonably tend to restrain or coerce employees. When a supervisor is included in the unit by agreement of the Union and the Employer and is permitted to vote in the election, the employees obviously regard him as one of themselves. Statements made by such a supervisor are . . . considered by employees to be the representations[, not] of management, but of a fellow employee. Thus they do not tend to intimidate employees. For that reason, the Board has generally refused to hold an employer responsible for the antiunion conduct of a supervisor included in the unit, in the absence of evidence that the employer encouraged, authorized, or ratified the supervisor's activities or acted in such manner as to lead employees reasonably to believe that the supervisor was acting for and on behalf of management.

See *Cypress Lawn Cemetery Assn*., 300 NLRB 609 fn. 2, 621 (1990), and cases cited there.

Montgomery Ward is immaterial to Supervisor Taylor's remarks to Davis in July 1990, when no union-represented bargaining unit was in existence and (so far as the record shows) the Union had not yet taken any position as to Taylor's inclusion in the unit specified in its representation petition filed 2 months later.[28] I find that Respondent violated

[27] The record fails to show whether either of them cast ballots, challenged or otherwise.

[28] Cf. *Craft Maid Kitchens*, 284 NLRB 1042 (1987), finding not attributable to the employer the conduct of an alleged supervisor whose name had been included in a *Norris-Thermador* list (see *Norris-Thermador Corp*., 119 NLRB 1301 (1958)) in a previous representation proceeding between the same parties, as well as in a *Norris-Thermador* list executed after the alleged supervisor had engaged in the allegedly unlawful conduct. Respondent's counsel stated at the hearing that Taylor did not become a supervisor until June 27, 1990, after his early May hire on the Green Hills job; and there is no evidence that he had ever worked for Respondent before. A finding that Respondent was answerable for Taylor's prepetition conduct gains support from *Dominguez Valley Hospital*, 287 NLRB 149, 150–151, 154–156 (1987), where the Board found an employer answerable for the conduct of a supervisor, after she had allegedly been included

Continued

Section 8(a)(1) when Davis told employee Burgess, in early July 1990, that Respondent was discriminating against union members in hiring employees for the Green Hills job. *Kessel Food Markets*, 287 NLRB 426, 427, 448 (1987), enfd. 868 F.2d 881 (6th Cir. 1989), cert. denied 110 S.Ct. 76 (1989).

Moreover, and notwithstanding *Montgomery Ward*, I find that Respondent violated the Act when Foreman Taylor told employee Stewart, who was passing out union T-shirts on the job before the 7 a.m. start of the workday about October 10, not to pass out T-shirts and hats on ''company time'' and without expressing any limitations (such as the carpenters restroom) as to location. *BJ's Wholesale Club*, 297 NLRB 611 (1990); *Southern Services*, 300 NLRB 1154 (1990), enfd. 954 F.2d 700 (11th Cir. 1992); *Gemco*, 271 NLRB 1190 (1984).[29] In so finding, I deem it unnecessary to determine whether *Montgomery Ward* had become relevant by the time of this incident. Assuming an affirmative answer arguendo, at about 3 p.m. on October 10 Respondent ratified Taylor's conduct when Project Superintendent McBrayer told employee Burgess (who had obtained the union T-shirts and caps and had participated with Stewart in handing them out) not to hand out such materials ''on the property; pass it out on the parking lot.''

However, *Montgomery Ward* calls for dismissal of the complaint allegations to Supervisor Johnny Morgan, all of which involved conduct after the Regional Director's issuance of his Decision and Direction of Election, and of the complaint allegations based on Supervisor Taylor's alleged threats to employee McCutcheon during that same period.[30] Although the stipulation which caused the Regional Director to find Morgan and Taylor eligible to vote merely stated that they were not supervisors, under the circumstances this amounted to a stipulation that they were properly in the voting unit.

in the voting group by agreement of the parties, partly on the ground that the employees had not been informed of this inclusion.

[29] The Green Hills job consisted of the remodeling of an existing Dillard's department store in a shopping mall, plus construction of an addition to that store. I believe it fair to assume that at the time Taylor issued these instructions, Respondent's Green Hills employees had at least some occasion to be lawfully present, in their capacity as employees, in areas which were nonworking areas with respect to themselves, employees of other contractors working on the job, and Dillard's own employees. The record is likely insufficient to permit a determination as to all of the exact locations where Respondent could not have lawfully forbidden distribution of union T-shirts and caps on the Green Hills job, which in any event has been completed. As to whether an employer may impose as to location the same restriction on distribution of union T-shirts and caps as on the distribution of union literature, I note that the distribution of inherently useful items to employees who had previously requested them presents less of a potential litter problem than does the distribution of unsolicited fliers and pamphlets. Cf. *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615, 618–621 (1962); *Farah Mfg. Co.*, 202 NLRB 666, 671 (1973) (distribution of union buttons equated with distribution of union cards, which *Stoddard-Quirk* equates with solicitation).

[30] I would in any event have dismissed the allegations based on Morgan's statements to employees Beattie and Skipper, on the ground that these statements are ambiguous and insufficient to support an unfair labor practice finding.

2. The 8(a)(3) and (1) allegations

a. *Respondent's antiunion animus*

The evidence demonstrates that Respondent strongly opposed union representation of its employees. Thus, in mid-June 1990, Company President Boler described the ''ways of the company'' as calling for its personnel to get ''out of the Union'' (see infra). Although he made these remarks at a company jobsite in Houston, Texas, Boler establishes Respondent's corporate labor policies and relates the labor policies set by him to the various job superintendents, who operate within parameters set by him (see infra). Consistent with these remarks by Boler (his immediate superior), Green Hills Superintendent McBrayer, although himself a longstanding member of one of the Union's sister carpenter locals, told Supervisor Taylor, who in July 1990 relayed this message to employee Davis, that McBrayer did not want to have trouble later on down the road if he got too many more union people on the Green Hills job; and told Union President Burgess, about 10 days before that job ended and while Superintendent Traylor was hiring employees for Respondent's Hickory Hollow job, that Burgess' distribution of union T-shirts and hats on the Green Hills job would hurt the employment with Respondent of ''union guys, sympathizers.'' Similarly, Green Hills supervisors Taylor and Johnny Morgan told Green Hills employee McCutcheon that if he or the Green Hills employees voted for the Union, he would have no chance of going to work for Respondent on the Hickory Hollow job.[31]

The foregoing findings as to Boler are based on Administrative Law Judge Joan Wieder's April 18, 1991, decision in *Oklahoma Installation*, Cases 16–CA–14647–1 and 16–RC–9320, of which the General Counsel has moved that I take judicial notice.[32] Respondent's opposition to this motion is based essentially on the ground that these facts as to Boler are immaterial because there is no evidence that he personally participated in deciding on the layoffs, and failures or refusals to hire, attacked in the complaint. Unlike Respondent, I do not regard this circumstance as rendering irrelevant the findings of Judge Wieder referred to here. Rather, such evidence suggests, at the very least, that the corporate labor policies established by Boler, and related by him to the job superintendents operating within the parameters set by him, included his opposition to unionization. Accordingly, the General Counsel's motion that I take judicial notice of Judge Wieder's decision is by granted.[33] Further, in light of such evidence, the statements and conduct of Green Hills Superintendent McBrayer and Green Hills Supervisors Taylor and Johnny Morgan consistent with Boler's views, the evidence that Boler was present in the Hickory Hills jobsite office when former Green Hills employee Davis unsuccessfully asked Hickory Hills Superintendent Traylor for a job, and

[31] Taylor's and Morgan's inclusion in the voting group does not affect the probative value of their statements in connection with Respondent's motives for the personnel action attacked in the complaint. *Montgomery Ward*, supra at 647.

[32] In the absence of exceptions, on June 7, 1991, the Board adopted her findings, conclusions, and Order.

[33] The Board's decision in the representation case (*Oklahoma Installation*, supra, 305 NLRB 812) states that ''All labor relations policies are centrally established by Boler from Oklahoma,'' in a context establishing that this is the same individual who in the record before me is identified as President Jack Boler.

Traylor's unexplained failure to testify, lead me to infer that both Green Hills Superintendent McBrayer and Hickory Hollow Superintendent Traylor attempted to effectuate Company President Boler's desire to avoid a union bargaining obligation.[34]

b. *The allegedly unlawful layoff of Burgess and Smith on October 10, 1990*

McBrayer knew before hiring Burgess that he was the union president. Burgess honored the picket line throughout the period it was maintained; distributed union authorization cards among his fellow employees; and on September 18, 1990, testified on the Union's behalf at the representation case hearing. Just before work on October 8, 1990, Burgess asked fellow employees whether they would like union T-shirts and union caps, whereupon Supervisor Taylor (who was present) said that he would appreciate it if Burgess did not get caught doing this on ''company time.'' Later that same day, Taylor told Burgess and his helper, Smith, not to come in the following day because Respondent had failed to receive a shipment of materials. Burgess and Smith in fact already had all the materials they needed for the work they were performing. Furthermore, when there was a lack of materials on the job, Respondent's practice during this period was to cut back hours rather than to lay employees off. Moreover, when Burgess returned to the job on October 10, he found that some of this work had been performed in his absence. Thereafter, during a conversation with Stewart into which McBrayer interjected the subject of union T-shirts, McBrayer said that he was disappointed in Stewart and Burgess because of their ''activities.'' When coupled with Respondent's anxiety to prevent organization of its employees, such evidence shows that Burgess was laid off because of his union activity, in violation of Section 8(a)(3) and (1) of the Act. Because there was in fact no shortage of materials, the only reason given for the layoff, the inquiry described in *NLRB v. Transportation Management Corp*., 462 U.S. 393, 401–403 (1983), is logically at an end. See *Limestone Apparel Corp*., 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982).

Although there is no evidence that Smith engaged in any union activity or that Respondent thought he did, I conclude that his layoff, too, violated Section 8(a)(1) and (3) of the Act because it was effected in an attempt to lend credence to Respondent's contention that Burgess was laid off because of a shortage of materials for the work both of them had been performing. *Wonder State Mfg. Co. v. NLRB*, 331 F.2d 737, 738 (6th Cir. 1964); *NLRB v. Armcor Industries*, 535 F.2d 239, 243 (3d Cir. 1976); *O'Dovero Construction*, 264 NLRB 751 (1982).

[34] Burgess testified that the antiunion letter distributed with the company T-shirts and caps had been written by Boler, and that Boler had passed out this clothing. However, McCutcheon testified that this letter was written by ''his lawyer, or something like that,'' referring to McBrayer; that McBrayer engaged in the distribution activity observed by McCutcheon; and that the letter and clothing were distributed about November 8, by which date Burgess had been permanently laid off. The letter is not in evidence.

c. *The layoffs on October 12, 1990*

Further, I find that Respondent violated Section 8(a)(3) and (1) by laying off employees Burgess, Stewart, Davis, and Wooten on October 12, 1990. More specifically, I find that Respondent's decision to effect a layoff on that day was not motivated by an honest belief that it had more workers than it needed but, rather, was motivated by a desire to rid itself of these four employees because of their union activity. Further, I find that even assuming Respondent's decision to effect a layoff was economically motivated, Respondent's decision to include these four employees in the layoff was motivated by their union activity.

The overt union activity of Union President Burgess has been summarized, supra, section II,B,C,1. As previously found, employee Stewart, whom Respondent knew to be the Union's recording secretary, honored the picket line during the entire period the line was maintained, distributed union authorization cards in Superintendent McBrayer's presence, and testified on the Union's behalf at the representation case hearing. Further, on October 10 both Burgess and Stewart openly distributed union T-shirts and union caps to their fellow employees before work or during the lunchbreak. Employee Davis honored the picket line all but the last 2 days it was up, distributed union cards in the presence of Superintendent McBrayer and Foreman Taylor, and wore a union shirt on the job. Employee Wooten wore a union T-shirt and hat on the job, and openly said that he supported the Union.

Moreover, after the October 12 layoffs, management wanted the remaining employees to work as many hours as they would; McBrayer went so far as to say that the carpenters were going to work 7 days a week and 12 hours a day (although they did not in fact do so); the amount of overtime worked on the job greatly increased; and some of the employees worked such long hours (up to 78 hours a week) that their ability to work efficiently may well have been impaired. However, even with this sharp increase in Respondent's payroll expenses,[35] Respondent was unable to complete the job by November 15, the day it was supposed to be completed; did not substantially finish it until November 21, which was the day before the Thanksgiving start of the Christmas shopping season; and did not wholly complete the job until after the holiday sales in January. In view of these facts, and because Respondent never (so far as the record shows) attempted to recall any of these laid-off employees to the behind-hand Green Hills job, I do not believe that Respondent's decision to lay off these four union sympathizers a month before the job was supposed to end was motivated by honest business judgment; rather, I conclude that Respondent decided on a premature layoff for the purpose, at least in part, of reducing the number of union sympathizers in its employ.

Furthermore, and regardless of Respondent's reasons for deciding to effect a layoff on October 12, I conclude that the inclusion of these four employees was motivated, at least in part, by their union activity. Union President Burgess and Union Recording Secretary Stewart had received wage in-

[35] The lowest paid carpenter left on the payroll received an overtime rate of $13.50 an hour, higher than the $12.50 straight time rate received by the highest paid laid-off carpenter. Much of the postlayoff overtime was worked by carpenters at an overtime rate of $18.75 an hour.

creases which brought them to Respondent's top level for nonsupervisory carpenters; and Wooten's wages had been increased from $8 to $8.75. Burgess' work had been complimented by Foreman Johnny Morgan; Stewart's work had been complimented by McBrayer on the very day of Stewart's layoff. Moreover, the reasons which McBrayer ascribed to Taylor for the selection of Davis, Stewart, and Wooten, and the reasons Taylor gave for the selection of Stewart, suggest in themselves that such reasons were these employees' union activity: thus, Taylor testified that he selected Stewart because of the coming up on the job of animosity part of which was the picket line and the union petition; and McBrayer testified that Stewart, Wooten, and Davis ''could all be grouped together . . . they were . . . no longer following directions as easily as they had in the past.''[36] Further, as to Davis and Wooten, McBrayer's testimony about the reasons Taylor gave for their selection is inconsistent with Taylor's explanation (''they were working in . . . a large stockroom [which] utilized a lot of space, and that part of the job was ending''). Such testimony by Taylor is inconsistent with his testimony that Wooten was then working in the main floor men's bathroom as a helper to Cason; and, even standing alone, raises the question of why the spaciousness of the almost-completed stockroom caused Taylor to select Davis and Wooten for layoff, rather than other employees. Moreover, Morgan's testimony that he selected Burgess for layoff, rather than the lower paid Northcott, because Northcott had more laminating skills, is difficult to square with Morgan's further testimony that not much more laminating work had to be performed.

In other words, as to both Respondent's decision to effect a layoff and its decision to include these four employees in that layoff, the reasons relied upon by Respondent (to the extent they are lawful reasons) are pretextuous—that is, they either did not exist or were not relied on. Accordingly, Respondent has failed to meet its burden of showing that even in the absence of the laid-off employees' union activity, Respondent would have effected a layoff and would have included these four employees in the layoff. See *NLRB v. E. I. Du Pont de Nemours & Co*., 750 F.2d 524, 529 (6th Cir. 1984); *American Licorice Co*., 299 NLRB 145, 148 fn. 22 (1990); *Limestone Apparel Corp*., supra at 722; *Turnbull Cone Baking Co*., 271 NLRB 1320, 1354–1357 (1984), enfd. 778 F.2d 292, 296–297 (6th Cir. 1985), cert. denied 476 U.S. 1159 (1986). Accordingly, I find that Respondent violated Section 8(a)(3) and (1) of the Act by laying off employees Burgess, Stewart, Davis, and Wooten on October 12, 1990.

d. *The alleged failures and refusals to hire for the Hickory Hollow job*

In addition, I find that Respondent violated Section 8(a)(3) and (1) of the Act by failing and refusing to hire, for the Hickory Hollow project, employees Burgess, Stewart, Davis, Beattie, Cason, McCutcheon, Skipper, and Wood. All of these employee engaged in overt union activity. The union activity of Union President Burgess, Union Recording Secretary Stewart, and Davis is summarized, supra, sections II,B,C,1, and D. All five of the remaining employees wore union T-shirts on the Green Hills job; and Beattie, Cason, and Skipper honored the union picket line. Green Hills Superintendent McBrayer had told Burgess, Cason, Davis, McCutcheon, and Stewart during their hiring interviews that Respondent would have work at other projects in the area, including the Hickory Hollow project, for at least the better Green Hills employees. Similarly, before the filing of the representation petition, McBrayer told Green Hills employee Beattie that his chances of getting work at other jobs to be performed by Respondent ''looked pretty good.'' Furthermore, of the approximately 63 nonsupervisory employees hired by Respondent for the Hickory Hollow job between November 25, 1990, and January 24, 1991, about 14 had formerly worked for Respondent at Green Hills and about 16 had formerly worked for Respondent at the Bellevue Mall project. However, after the Union filed its representation petition, which requested a unit including the Hickory Hollow job, Foremen Taylor and Morgan told employees McCutcheon and Beattie that their union activity would prevent them from getting employment with Respondent on that job. Moreover, about 10 days before the Green Hills job had been substantially completed, Green Hills Superintendent McBrayer told employee Burgess that his union activity would ''hurt'' the ''union sympathizers'' employment with Respondent.

The work of all eight of these employees had been satisfactory or better at the Green Hills job. By the time of their layoff from that job, Beattie, Burgess, Cason, Skipper, and Stewart were all receiving $12.50 an hour, Respondent's highest rate on that job for nonsupervisory carpenters. Moreover, McCutcheon and Wood had received a wage increase while on that job. There is no evidence or claim of any deficiencies in any of these eight employees' work at Green Hills, or that their abilities as shown by their work there were bettered or even equalled by those of the carpenters who were in fact hired for the Hickory Hollow job. Indeed, Respondent hired for that job two employees (Guinn and Dickens) who had been included in an August 1990 layoff list which had been drawn up by the Green Hills foremen and which did not include Beattie or Davis; Guinn's job application had been turned in by Beattie on the same date (November 28) as he turned in his own application. At the time of their respective layoffs from the Green Hills job, Dickens and Guinn were being paid $12 an hour, less than Beattie, Burgess, Cason, Skipper, and Stewart had been receiving when they had been laid off at Green Hills. Furthermore, the only reason which Respondent has ever given for failing or refusing to hire these eight employees—namely, that Respondent did not need any more employees—is demonstrably false.

In view of the foregoing evidence and the evidence summarized, supra, section II,G,2,a, I conclude that the General Counsel has shown that Respondent's failure and refusal to hire these employees for the Hickory Hollow job was motivated at least partly by their union activity. Contrary to Respondent, I do not believe that the General Counsel's case is fatally flawed by the absence of direct evidence that antiunion bias was entertained by Hickory Hill Superintendent Traylor, who made the final hiring decisions on that job and who unexplainedly failed to testify. As shown supra,

[36] In view of this testimony by McBrayer and Taylor, and for demeanor reasons, I do not credit Taylor's and Johnny Morgan's testimony that during the conference about whom to lay off, the employees' union activity was not mentioned. See *Walton Mfg*., supra at 369 U.S. at 408.

Company President Boler did not want Respondent's employees to be union represented; he set Respondent's labor policy and related it to the superintendents (like Traylor and McBrayer), who operated within the parameters set by Boler; although McBrayer was a longtime union member, he believed that this antiunion policy extended to Traylor and would be followed by him; and Boler was in the Hickory Hill office when Traylor refused to hire Davis because of his union activity. Because the antiunion Boler was the immediate superior of the company representative (Superintendent Traylor) who decided on whom to hire, Respondent's case is not significantly assisted by the cases cited in its brief, which cases found irrelevant the evidence of bias by subordinates of the deciding officer or by persons unrelated to the decisionmaking. Nor is a contrary result suggested by Respondent's retention of five of the claimants (Beattie, Cason, McCutcheon, Skipper, and Wood) until the November 21 semicompletion of the Green Hills job, which was understaffed following the discriminatory layoff on October 12 of Burgess, Stewart, Davis, and Wooten; or by the fact that of the approximately 14 nonsupervisory Green Hills employees who were eventually hired for the Hickory Hollow job, about 3 had worn union T-shirts on the Green Hills job.[37] See *NLRB v. Centra, Inc*., 954 F.2d 366 (6th Cir. 1992); *NLRB v. Instrument Corp*., 714 F.2d 324, 330 (4th Cir. 1983); *Fredonia Valley Quarries*, 272 NLRB 843, 847 fn. 23 (1984); and *Master Security Services*, 270 NLRB 543, 552 (1984).

Because the record refutes Respondent's contention that the eight claimants were denied employment for the reason that no employees were needed, Respondent has plainly failed to sustain its burden of showing that they would not have been hired even in the absence of their union activity. Accordingly, I find at this point that Respondent violated Section 8(a)(3) and (1) of the Act by failing and refusing to hire Cason on and after November 26, 1990; Skipper on and after November 27, 1990; Wood and Beattie on and after November 28, 1990; and Burgess on and after January 14, 1991. Also, I find that Respondent violated Section 8(a)(3) and (1) by failing and refusing to hire McCutcheon on and after November 26, 1990, when he filed his first filled-out application blank. Because when he filed his first application Traylor untruthfully told him that Traylor did not need any help, because after McCutcheon filed his second application on December 3 Respondent continued to deny him employment on the demonstrably false ground that Respondent did not need employees, and because the only evidence that his first application had been lost is his testimony (although received without objection or limitation) that he had been so told by Respondent's secretary, I conclude that this representation was as false as the previous and subsequent misrepresentations which Respondent used to avoid hiring him.

Further, I find that Respondent was answerable for the false representation to employee Stewart, when he telephoned Respondent's Hickory Hollow office during the first week in December 1990 and asked whether job applications were then being accepted, that Respondent was not accepting such applications;[38] that this misrepresentation caused Stewart to fail to file a written application that day; and that, therefore, Respondent unlawfully failed and refused to hire Stewart on and after December 7, 1990.[39] For similar reasons, I find that Respondent violated Section 8(a)(3) and (1) by failing and refusing to hire Davis on and after January 4, 1991, the day when he went to the Hickory Hollow jobsite and asked Superintendent Traylor for a job; I so find because Davis' failure to file a written application blank on that day was due to Traylor's false representation that he already had a full crew (see supra fn. 39). However, I do not accept the General Counsel's contention that an earlier date should be found as to the discrimination against Davis. Although I credit his testimony that he did not request a job at an earlier date because friends had told him Respondent was not hiring union activists for that job, and although Respondent did in fact follow a discriminatory hiring policy on that job on and after November 26, 1990, the record fails to show either when Davis received this report, or when he would likely have applied if he had not received it.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has violated Section 8(a)(1) of the Act in the following respects:

(a) By telling employee Burgess, through Superintendent McBrayer, that Burgess' distribution of union T-shirts and union hats would hurt the employment of union sympathizers with Respondent; and that Burgess' union activities had hurt McBrayer's feelings.

(b) By telling employee Stewart, through Superintendent McBrayer, that McBrayer was disappointed in Stewart and Burgess for their union activities.

(c) Through Superintendent McBrayer, by distributing T-shirts and caps, bearing Respondent's logo, immediately after distributing letters from Respondent urging a ''no'' vote, and to employees who had not requested such garments.

(d) By telling employee Davis, through Foreman Taylor, that Respondent was discriminating against union members in hiring.

(e) Through Foreman Taylor, by telling employee Stewart, when he was passing out union T-shirts on the job before the start of the workday, not to pass out T-shirts and hats on ''company time'' and without expressing any limitations as to location.

4. Respondent has violated Section 8(a)(3) and (1) of the Act in the following respects:

(a) Laying off employees Burgess and Smith on October 10, 1990.

(b) Laying off employees Burgess, Stewart, Davis, and Wooten on October 12, 1990.

(c) Failing and refusing to hire (1) employees Cason and McCutcheon on and after November 26, 1990; (2) employee

[37] However, one of these employees, Bates, wore his union clothing for only 1 day.

[38] See *Southwestern Bell*, supra at 1502; *Today's Man*, 263 NLRB 332 (1982); Fed.R.Evid. 103(a)(1).

[39] *American Press v. NLRB*, 833 F.2d 621, 627 (6th Cir. 1987), enfg. 280 NLRB 937, 942 (1986); *NLRB v. Valley Die Cast Corp*., 303 F.2d 64, 66 (6th Cir. 1962).

Skipper on and after November 27, 1990; (3) employees Wood and Beattie on and after November 28, 1990; (4) employee Stewart on and after December 7, 1990; (5) employee Davis on and after January 4, 1991; and (6) employee Burgess on and after January 14, 1991.

5. The unfair labor practices set forth in Conclusions of Law 3 and 4 affect commerce within the meaning of Section 2(6) and (7) of the Act.

6. Respondent has not violated Section 8(a)(1) of the Act through Foreman Johnny Morgan, or by any threats by Foreman Taylor to employee McCutcheon.

THE REMEDY

Having found that Respondent has violated the Act in certain respects, I shall recommend that Respondent be ordered to cease and desist therefrom, and from like or related conduct. Also, in the event that the Hickory Hollow job is still in progress, Respondent will be required to offer employment on that job to the eight employees whom Respondent unlawfully failed and refused to hire for that job. In addition, Respondent will be required to make Wooten's estate (see supra fn. 6), and the other discriminatees, whole for any loss of pay they may have suffered by reason of the discrimination against them, in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The unfair labor practices herein found occurred at two projects in Davidson County, Tennessee—namely, the Green Hills job and the Hickory Hollow job. Because the Green Hills job was completed before the hearing and the Hickory Hollow job has probably been completed by this time, and because Respondent's main office is in Oklahoma, Respondent likely has no place of business where the posting of notices would effectively apprise of their statutory rights the employees who worked for Respondent during the commission of these unfair labor practices. Further, the Board has held that a unit of Respondent's carpenters, apprentice carpenters, and carpenter's helpers in Davidson County would be appropriate for collective-bargaining purposes. Accordingly, Respondent will be required to mail a copy of the attached notice to each of the employees who worked for it at the Green Hills job on or after July 9, 1990, the approximate date when Respondent began unfair labor practices directed at its Green Hills employees; to each of the employees who worked for it on the Hickory Hollow job (all of them having been hired after July 9, 1990), unless that job is still in progress when notices are first posted on that job; and to each of the carpenters, apprentice carpenters, and carpenter's helpers who worked for Respondent in Davidson County, Tennessee, on or after July 9, 1990, on jobs which are no longer in progress. Also, Respondent will be required to post notices at all of its Davidson County jobs which are still in progress.

[Recommended Order omitted from publication.]